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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

GERARDO FLORES,

Defendant and Appellant.

2d Crim. No. B214870
(Super. Ct. No. 1138117)
(Santa Barbara County)

Appellant Gerardo Flores appeals the judgment following his no contest plea to conspiracy to transport cocaine. (Pen. Code, § 182, subd. (a)(1), Health & Saf. Code, § 11352, subd. (a).) He argues that the trial court abused its discretion by imposing the upper term of five years. We disagree and affirm.

FACTS

Appellant was one of 20 individuals arrested as part of a large scale drug trafficking organization in Santa Barbara. Police intercepted appellant's telephone call to a codefendant in which appellant arranged to purchase cocaine. Prior to the purchase, police conducted a traffic stop of appellant's vehicle. They recovered marijuana from appellant's person and in the center console. Appellant's passenger (his wife or girlfriend) had two ounces of cocaine in her purse, which she said belonged to her. In

2004, a grand jury indicted appellant and his codefendants. In 2007, he entered a no contest plea to conspiracy to transport cocaine.

At sentencing, the trial court (Judge Brian Hill) placed appellant on three year's probation, indicating it would terminate probation after six months if appellant complied with all the terms. The plea agreement indicated that appellant could face five years in state prison. Appellant added the handwritten statement that he conspired to transport cocaine for personal use only. From the date of his arrest in 2004 until the entry of his plea in 2007, he had a succession of five attorneys.

On May 20, 2008, appellant was stopped by the police, who had received reports of a driver weaving between lanes. Appellant's passenger was a felon with an active parole warrant. The deputies recovered a large plastic pill bottle of marijuana, approximately two ounce of methamphetamine, a loaded revolver and evidence of counterfeiting. His passenger had in his possession a glass pipe and a small baggie of methamphetamine.

In October 2008, the trial court (Judge Rick Brown) found appellant to be in violation of probation. The matter was assigned for sentencing to Judge Frank Ochoa, who sentenced appellant to five years in state prison. Appellant was represented by his sixth attorney, who moved to recall his sentence under Penal Code section 1170, subdivision (d). The court granted the motion.

At the sentencing hearing, the prosecutor played a recorded telephone conversation between appellant and a codefendant which had been made in 2004. A transcript was attached to the sentencing memorandum. It was offered to show that appellant was a major participant in the conspiracy. During the conversation, appellant attempted to convince his codefendant that he was not working with the police, and did not cause a raid on another codefendant. A supplemental probation violation report recommended imposition of the five-year upper term. The report indicated that appellant had not benefited from the court's prior lenient grant of probation because he appeared to still be entrenched in a dangerous criminal lifestyle.

The court stated, "Based on the evidence before me, I do find that the circumstances in aggravation outweigh circumstances in mitigation. The manner in which the crime was carried out indicates a high degree of planning, sophistication, professionalism. It was a large quantity of contraband involved over time and a number of transactions involved, and there is evidence that [appellant] induced another into the criminal enterprise, involving them in the subsequent prosecution and receipt of criminal conviction. I'm going to impose the upper term of five years in this matter."

DISCUSSION

Appellant argues that the trial court abused its discretion by imposing the upper term. At the time he committed the offense in 2004, Penal Code section 1170, subdivision (b) provided that the sentencing court must impose the middle term, unless it could establish, by a preponderance of the evidence, that the factors in aggravation outweighed the factors in mitigation. The court was required to state on the record its reasons for imposing the upper or lower term. In 2007, Penal Code 1170, subdivision (b) was amended so that the middle term was no longer the presumptive term absent aggravating or mitigating facts found by the trial judge. (Stats. 2007, ch. 3, § 2.) The court now has the discretion to impose an upper, middle or lower term based on reasons he or she states.

As amended, Penal Code section 1170, subdivision (b) now provides in part, "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected"

Appellant contends that application of the current statute would violate prohibitions against ex post facto laws because the offenses for which he was convicted occurred prior to the effective date of the new law. This claim was rejected in *People v. Sandoval* (2007) 41 Cal.4th 825, which concluded that there was no ex post facto violation in applying the amended statute to crimes committed before its effective date.

(*Id.* at p. 855.) The amendment did not subject defendants to greater punishment, but merely increased the amount of discretion the trial court has to impose an aggravated sentence. (*Id.* at pp. 853-855.)

Appellant argues that the record established that he had only a "peripheral" role in the enterprise, and that his minor involvement and "minimal criminal history" should have been considered mitigating factors. He claims the record does not support the conclusion that he was involved in the planning or the operation of the drug trafficking ring.

The trial court considered the prosecutor's sentencing memorandum which provided citations to evidence in the grand jury transcript of multiple narcotics transactions. Appellant's conversation on the recorded phone call confirmed his longtime participation in the conspiracy. The court's reference to appellant's involvement of another person in the criminal enterprise is an apparent reference to his girlfriend or wife. According to the probation report, she was present when his car was stopped and told the officers that the two ounces of cocaine in her purse belonged to her. The sentencing memoranda referred to a portion of the grand jury transcript that stated appellant gave the cocaine to his passenger to hide in her purse so he could avoid detection by law enforcement. Although appellant's five prior convictions were for misdemeanors (obstructing a public officer, battery, fighting in public and possession of marijuana), this does not mitigate the seriousness of the instant criminal misconduct.

The trial court complied with both the pre-2007 version of Penal Code section 1170, as well as the amended version. It read the sentencing memoranda, heard argument and set out its reasons for imposing the upper term. This was after the court had granted appellant's motion to recall his sentence so it could reconsider the matter.

Appellant argues that, at the initial probation hearing, he received a light sentence and there was no mention of an aggravating factor. He contends that imposition of the upper term was an abuse of discretion because there was no change in circumstances regarding the underlying offense. Yet one year later, the court found that aggravating factors outweighed mitigating factors. When appellant entered the no contest

plea, he acknowledged that he faced a possible five-year prison sentence. He violated probation, and the court imposed the upper term of five years. There was no abuse of discretion.

DISPOSITION

The judgment is affirmed.

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COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Frank J. Ochoa, Judge
Brian Hill, Judge
Rick Brown, Judge
George Eskin, Judge
Superior Court County of Santa Barbara

Arielle Bases, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Keith H. Borjon, Supervising Deputy Attorney General, Sharlene A. Honnaka, Deputy Attorney General, for Plaintiff and Respondent.